

No. of Copies rec'd
List ABCDE

TABLE OF CONTENTS

| | |
|--|----|
| SUMMARY | i |
| I. INTRODUCTION | 2 |
| II. GRANT OF THE WAIVER REQUEST WILL PROVIDE CONSUMERS WITH BENEFICIAL, NEW PROGRAM OFFERINGS WITH NO NEGATIVE EFFECT ON EXISTING PROGRAM SERVICES | 4 |
| III. BECAUSE IT WOULD ALLOW PLATFORM-NEUTRAL, IN-HOME DELIVERY OF EARLY-RELEASE, HIGH-DEFINITION FEATURE FILMS, THE WAIVER HAS BEEN EMBRACED BY CONSUMER GROUPS, ELECTRONICS MANUFACTURERS, AND TELCO, SATELLITE AND CABLE MVPDS. | 5 |
| IV. THE COMMISSION SHOULD REJECT CALLS TO MANDATE THAT MOTION PICTURE PRODUCERS AND MVPDS MAKE CONTENT AVAILABLE OVER SPECIFIED OUTPUTS | 7 |
| V. IMPOSING ARBITRARY AND UNNECESSARY TIME-BASED RESTRICTIONS WOULD FRUSTRATE THE PUBLIC INTEREST BENEFITS OF THE WAIVER | 9 |
| A. A Temporary Waiver is Tantamount to a Denial..... | 10 |
| B. A Limited Time Window for the New Services Would be Arbitrary and is Unnecessary | 10 |
| VI. PETITIONERS HAVE FULLY DEMONSTRATED THE VALIDITY OF THEIR CONCERNS REGARDING THE SECURE DELIVERY OF HIGH-VALUE CONTENT | 11 |
| VII. PETITIONERS HAVE SATISFIED THE REQUIREMENTS NECESSARY TO OBTAIN A WAIVER | 12 |
| A. The Petition Meets the Commission's Procedural Requirements for Seeking Waiver of the SOC Prohibition..... | 12 |
| B. The Petition is Sufficiently Specific to Justify Grant of a Waiver | 13 |
| VIII. CONCLUSION | 14 |

SUMMARY

Motion Picture Association of America, Inc. ("MPAA") submits these Reply Comments in support of its petition for waiver (the "Waiver Request" or "Petition") of the restriction on the use of selectable output control ("SOC"). MPAA's member companies ("Petitioners")—six of the world's largest producers and distributors of theatrical motion pictures, packaged home video material, and audiovisual programs for home reception via broadcast, cable, satellite, and the Internet—are interested in exploring opportunities with multichannel video program distributors ("MVPDs") to provide high-value, high-definition motion pictures to consumers prior to their release on prerecorded media (*e.g.*, DVDs) for general in-home viewing. Such a valuable offering necessarily requires the highest level of protection possible through use of SOC. Accordingly, MPAA has requested that the Commission grant a waiver ("Waiver") of the SOC restriction in the case of an MVPD's offering of high-definition movies in digital format prior to the release of such movies on prerecorded media.

The new services that Petitioners seek to offer are exactly the type of offering that the Commission contemplated when it indicated a willingness to waive the SOC rule in order to facilitate the creation of new business models that are advantageous to consumers and serve the public interest. Grant of the Waiver will provide consumers an entirely new, innovative, and highly desirable home viewing option never before accessible. And, despite allegations to the contrary by certain opponents, the Waiver would apply only to *new* program offerings that are not now and *never* have been available to any MVPD subscriber. Thus, consumers' expectations regarding the continuity of their existing service and their ability to view and record programming will not be compromised in any way.

Consumer groups, electronics manufacturers, and telco, satellite, and cable MVPDs all

have recognized that grant of the Waiver will produce substantial benefits for consumers without any corresponding harm. In addition, prompt grant of the Waiver will foster competition in video distribution by ensuring that all MVPD platforms can offer early-release feature films. The Waiver also can help further the DTV transition by providing a significant new incentive for consumers to purchase high-definition television sets.

There is no reason to condition the Waiver by requiring motion picture producers and MVPDs to make content available over specified outputs. With respect to the digital outputs that CableLabs has approved in its technology licenses, or that other non-cable MVPDs have approved for use with their services, the MPAA member companies recognize these technologies and their value in protecting many forms of digital content. Determinations on whether they are appropriate for the entirely new services contemplated herein, however, involve different considerations and should be business decisions that are left to the marketplace. Similarly, the Commission should not establish a single technical standard that all MVPDs must use to implement SOC. Petitioners and MVPDs should have the flexibility to use the technologies that are best suited to serve the needs of their customers, while balancing the need to protect their content.

Nor should the Commission impose arbitrary and unnecessary time-based restrictions that would frustrate the public interest benefits of the waiver. Any calendar-based restriction on the timeframe for the Waiver would be impractical and fail to provide the regulatory certainty needed by movie producers to enter into negotiations with MVPDs for the distribution of early-release, high-definition films. Petitioners and MVPDs are not likely to invest the substantial amounts of capital and marketing resources necessary to launch a new, early-release movie service knowing that this investment could evaporate on a certain date. In addition, the

Commission should refrain from imposing a limited time window, such as 120 days, for the use of SOC. All movies do not experience the same release pattern, and an arbitrary time window could artificially exclude certain content and thus limit the choices available to consumers.

Petitioners have satisfied the requirements specified by the Commission for allowing the use of SOC. Petitioners' proposed services involve high-value content in high-definition format that has never before been offered to MVPD subscribers in such an early window. Thus, they without question represent a "new business model" along the lines the Commission envisioned with respect to SOC waivers. It is clear that the Commission did not intend for a party seeking to use SOC to follow the procedures established for the modification of encoding rules under Sections 76.1905 and 76.1906 of the Commission's rules. Rather, the Commission invited the filing of "waivers, petitions, or other proposals" with respect to the rule on SOC, which MPAA has done.

Failure to grant the Waiver—which is necessary to enable protection against indiscriminate reproduction and redistribution of Petitioners' extremely high-value content—would impede consumers' ability to gain access to a broad range of early release movies in their homes via MVPDs. By granting the Waiver Request, however, the Commission will open the door to new, exciting services for consumers: a variety of high-definition, first-run movies delivered to their home televisions via their MVPD, in an earlier timeframe than ever previously offered. Permitting the use of SOC will greatly benefit consumers who choose to take advantage of these new offerings and will in no way prevent other consumers from continuing to enjoy the services they presently enjoy. For these reasons, MPAA urges the Commission to grant the requested Waiver expeditiously.

**Before the
Federal Communications Commission
Washington, D.C. 20554**

| | | |
|---|---|----------------------|
| In the Matter of |) | |
| |) | |
| |) | |
| Motion Picture Association of America, Inc. |) | |
| |) | MB Docket No. 08-82, |
| |) | CSR-7947-Z |
| |) | |
| |) | |
| Petition for Waiver of |) | |
| 47 C.F.R. § 76.1903 |) | |

**Reply Comments
of
MOTION PICTURE ASSOCIATION OF AMERICA, INC.**

These Reply Comments are submitted by Motion Picture Association of America, Inc. ("MPAA") in response to Comments filed in the above-referenced proceeding pursuant to the *Public Notice* released by the Media Bureau on June 5, 2008.¹ MPAA represents six of the world's largest producers and distributors of theatrical motion pictures, packaged home video material, and audiovisual programs for home reception via broadcast, cable, satellite, and the Internet.² MPAA filed the subject petition for waiver (the "Waiver Request" or "Petition")³ on

¹ *MPAA Files Petition for Waiver of the Prohibition on the Use of Selectable Output Controls*, Public Notice, DA 08-1081, MB Docket No. 08-82, CSR-7947-Z (rel. June 5, 2008).

² These members include Paramount Pictures Corporation, Sony Pictures Entertainment, Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLLP, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment, Inc. (collectively, "Petitioners").

³ Motion Picture Association of America, Inc., Petition for Waiver of 47 C.F.R. § 76.1903, CSR-7947-Z (filed May 9, 2008).

behalf of its member companies, seeking to remove a regulatory impediment to their ability to partner with multichannel video program distributors ("MVPDs") to provide consumers with new and exciting high-definition program services consisting of recent movies not otherwise available for home viewing. Specifically, MPAA has requested that the Commission waive the restriction on the use of selectable output control ("SOC") in the case of an MVPD's offering of high-definition movies in digital format prior to the release of such movies on prerecorded media. Failure to grant such waiver ("Waiver")--which is necessary to enable protection against indiscriminate reproduction and redistribution of this extremely high-value content--will impede consumers' ability to gain access to a broad range of early release movies in their homes via MVPDs. The comments filed in opposition to the Petition do not provide a basis for the Commission to conclude that granting the Waiver Request would not be in the public interest. Accordingly, MPAA urges the Commission to grant the Waiver Request expeditiously.

I. INTRODUCTION

As outlined in the Petition, MPAA's member companies are interested in exploring opportunities with MVPDs to provide high-value, high-definition ("HD") motion pictures to consumers prior to their release on prerecorded media (*e.g.*, DVDs) for general in-home viewing. As explained in further detail below, such a valuable offering necessarily requires the highest level of protection possible through use of SOC. When the Commission adopted regulations restricting MVPDs from using SOC functionality, the Commission explicitly recognized that SOC might have applications that would be advantageous to consumers and, thus, stated that it would consider petitions to waive the rule in order to facilitate the creation of new business models that serve the public interest.⁴ The new services that the Petitioners seek to offer

⁴ *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of*

("Services")⁵ are exactly the type of "new business models" that the Commission contemplated.⁶

The Services can provide significant benefits to a very broad array of consumers without corresponding harm and without altering the current application of the Commission's encoding rules. Because the Waiver would be pro-consumer and platform-neutral, the MPAA's Waiver Request has been embraced by numerous parties, including consumer groups, electronics manufacturers, and cable and non-cable MVPDs. As these parties demonstrated in their comments, grant of the Waiver will serve the public interest by providing more viewing options than currently exist today. In addition, the Services can help further the DTV transition by providing a significant new incentive for consumers who do not currently have high-definition television sets to purchase them. On the other hand, those parties who proposed that the Commission condition the Waiver by applying arbitrary time limits or requiring motion picture producers and MVPDs to make content available over specified outputs have not established that the public interest requires or is even consistent with such conditions, because, as shown below, such restrictions would be arbitrary, unnecessary, and counterproductive.

Prompt grant of the Waiver also will foster competition. As video distribution rapidly evolves through use of digital technologies and the Internet, consumers are starting to access video content, including feature films, in new and innovative ways. For example, Sony Pictures has announced that it will test the release of "Hancock" over the Internet for home viewing

Navigation Devices; Compatibility between Cable Systems and Consumer Electronics Equipment, Second Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 20885, 20912 (2003) ("Plug and Play Order").

⁵ As defined in the Petition, "Services" refers to providing consumers with the ability to view recently released theatrical, high-definition movies directly through an MVPD.

⁶ Although the Services as a category are the type of "new business models" that the Commission sagely predicted could be facilitated by the use of SOC, the specific parameters of the Services may vary among MVPDs, among motion picture studios, and even among releases from the same motion picture studio. These details can only be established through negotiations between individual studios and MVPDs.

through a secure interface.⁷ Thus, some consumers with broadband Internet access will be able to view recent movies in their homes regardless of whether the Commission grants the Waiver in this proceeding. The question before the Commission in this proceeding is whether MVPDs also will be able to become competitive outlets for such services and serve the millions of consumers who do not have access to these services over the Internet.

II. GRANT OF THE WAIVER REQUEST WILL PROVIDE CONSUMERS WITH BENEFICIAL, NEW PROGRAM OFFERINGS WITH NO NEGATIVE EFFECT ON EXISTING PROGRAM SERVICES

Despite allegations to the contrary by certain opponents, the Waiver would apply only to *new* program offerings that are not now and *never* have been available to any MVPD subscriber. Thus, the Waiver would not affect the continuity of consumers' existing services or their ability to view and record any program presently available for recording. Rather, the Waiver will provide consumers an entirely new, innovative, and highly desirable home viewing option never before accessible, without affecting other services they currently receive.

The Commission should not deny consumers this new option to view video programming simply because some consumers may not be able to access such services at this time. Under the logic put forth by some commenters, the Commission would have been compelled to prohibit color television because millions of consumers who had purchased black and white TVs would be "frustrated" or "disenfranchised." But the fact was that black and white TV set owners were able to continue receiving the same black and white services that they had been receiving, and the purchasers of new, color sets were able to receive an exciting new color service that never before had been available. Over time, owners of black and white sets replaced their devices with

⁷ Tim Arango, *A Bravia New World: Sony Steps Out on Movie Delivery*, INTERNATIONAL HERALD TRIBUNE, June 30, 2008 (discussing Sony's delivery of "Hancock" over the Internet to U.S. viewers' with Sony Bravia televisions enabled with an Internet connection).

color ones and were able to enjoy the added benefits of that service. The same holds true for the introduction of HD devices and services today—manufacturers and content providers are now offering a wide array of HD products and services despite the fact that some early standard definition (“SD”) digital sets are incapable of accessing HD content. This natural evolution is the hallmark of innovation in both the technology and content distribution sectors and only serves to enrich the consumer experience. Similarly, grant of the instant Waiver will provide opportunities to enfranchise, not disenfranchise consumers and will provide millions of MVPD subscribers, for the very first time, the ability to watch high-definition movies in their homes before they are released in DVD format.

Petitioners are seeking the ability to innovate, to provide services never before available to consumers. The freedom to innovate should not be stifled by preconceived assumptions that innovation will harm consumers or that it should be encumbered by regulatory conditions. When, as here, parties are proposing entirely new services that will have no impact whatsoever on existing services, the assumption should be that consumers can only benefit from an additional viewing opportunity and that innovation should not be inhibited by regulatory constraints. Moreover, content providers and MVPDs have very strong incentives to provide services that consumers find attractive. They succeed when consumers are pleased and fail when consumers are displeased. Thus, content providers and MVPDs will be compelled to strike the appropriate balance of offering a secure, compelling service while avoiding consumer confusion or frustrating consumer expectations.

III. BECAUSE IT WOULD ALLOW PLATFORM-NEUTRAL, IN-HOME DELIVERY OF EARLY-RELEASE, HIGH-DEFINITION FEATURE FILMS, THE WAIVER HAS BEEN EMBRACED BY CONSUMER GROUPS, ELECTRONICS MANUFACTURERS, AND TELCO, SATELLITE AND CABLE MVPDS.

There is support for the requested waiver as reflected in comments filed by diverse

groups, including Americans for Tax Reform/Media Freedom Project, AT&T Inc., Directors Guild of America *et al.*⁸, Sony Electronics Inc. ("Sony Electronics"), DIRECTV, Inc. and others. These commenters champion new, highly attractive viewing choices for their respective constituencies and consumers because they recognize that granting this Waiver will produce substantial benefits for consumers without any corresponding harm.⁹ They have seen that the choice is simple from the consumer perspective: either the Waiver will be granted and consumers will have an opportunity to access these new services, or the Waiver will not be granted and consumer choices will be unnecessarily limited. Accordingly, most of the comments filed in this proceeding wisely favor more choices for consumers.¹⁰

There is no need to condition the Waiver as some commenters have suggested.¹¹ The proposed conditions primarily reflect attempts to protect established business models and practices by seeking the Commission's intervention in a fully operational marketplace. Ultimately, the Commission should disregard opponents' rhetoric and grant the Waiver without conditions that would interfere with and limit Petitioners' ability to respond to the needs of

⁸ This group includes the Directors Guild of America as well as the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, hereinafter "Coalition of Directors, Technicians and Artists."

⁹ See, e.g., Comments of AT&T, Inc. ("AT&T Comments") at 2 ("MPAA has persuasively shown that grant of its waiver request will expand consumer choice by allowing consumers to purchase and enjoy high definition digital movies in their own homes prior to release of such films on pre-recorded media...[yet] at the same time...would not affect any other programming."); Comments of DirecTV, Inc. ("DirecTV Comments") at 1-3; Comments of Americans for Tax Reform and the Media Freedom Project ("ATR Comments") at 1-2; Comments of the National Cable & Telecommunications Association ("NCTA Comments") at 1-3.

Even those parties that support limitations on the requested waiver acknowledge that the proposed new service will benefit consumers. See, e.g., Comments of TiVo, Inc. ("TiVo Comments") at 3 ("TiVo believes that a properly crafted waiver will...allow MPAA's members to bring exciting new content to consumers.").

¹⁰ See *supra* n. 9; see also Comments of National Taxpayers Union at 1-2 (supporting grant of Petition because "consumers deserve maximum freedom of choice" and because "competition drives down prices and encourages new product development").

¹¹ See generally Comments of National Association of Theatre Owners ("NATO Comments"). See also Comments of Sony Electronics, Inc. ("Sony Comments"); Comments of Digital Transmission Licensing Administrator, LLC ("DTLA Comments"); and TiVo Comments.

consumers. Below we directly respond to certain of these proposals.

IV. THE COMMISSION SHOULD REJECT CALLS TO MANDATE THAT MOTION PICTURE PRODUCERS AND MVPDs MAKE CONTENT AVAILABLE OVER SPECIFIED OUTPUTS

Several comments, such as those from Digital Transmission Licensing Administrator, LLC (“DTLA”) and TiVo, Inc. (“TiVo”), urge the Commission to condition the Waiver on a requirement that the proposed new Services be provided through all digital outputs approved by CableLabs and by other non-cable MVPDs.¹² There is no demonstrated public interest need, however, for the Commission to mandate which outputs must be used to provide the proposed new Services, and a one-size-fits-all approach would not take into account potential variances between different services and providers. For the new business model the Waiver would make possible, Petitioners and MVPDs should have the flexibility to use the technologies that are best suited to serve the needs of their mutual customers, while balancing the need to protect their content. Again, it is not in the interest of the Petitioners or the MVPD providers to unnecessarily limit access to the services or to cause consumer confusion.

DTLA contends that decisions with respect to use of particular outputs “cannot be left to the unfettered discretion of content owners and MVPDs.”¹³ This statement belies the complex realities involved with the development and inclusion of various inputs, outputs, and content protection technologies on video reception equipment. This process involves interaction among and decisions by various parties at different stages, including device manufacturers and output technology proponents. Indeed, when device manufacturers make decisions about which inputs and outputs to include on their devices, it has a profound impact on how consumers can use those devices and the services they will be able to receive. However, given the dynamic nature and

¹² TiVo Comments at 5-6; DTLA Comments, at 13-14.

¹³ DTLA Comments at 2.

rapid evolution of technology today, these decisions are appropriately left to the marketplace and private sector solutions.

As a practical matter, Petitioners and MVPDs will strive for the broadest possible reach for their offering that also provides appropriate protection. With the ever-increasing number of video programming outlets presently competing for consumers' attention—including broadcasting, MVPD linear and on-demand content, DVDs, the Internet, and mobile—every content provider, including each MPAA member company, is focused on the best way to provide quality content at a competitive price. Thus, the intense competition in the video distribution marketplace also vitiates any purported need for additional regulatory restrictions.

With respect to the digital outputs that CableLabs has approved in its technology licenses, or that other non-cable MVPDs have approved for use with their services, the MPAA member companies recognize these technologies and their value in protecting many forms of digital content. However, the approval processes used by these entities are intended to evaluate whether such outputs are generally appropriate for use with content currently available on MVPD platforms. Determinations on whether they are appropriate for the new Services contemplated herein involve different considerations and should be business decisions that are left to the marketplace.

The Commission should also decline the request of Sony Electronics to condition the waiver by requiring establishment of a single technical standard that all MVPDs must use to implement SOC.¹⁴ Both cable and satellite MVPDs have the technical capability to implement SOC in ways appropriate to their networks, and the imposition of a single standard would only add unnecessary cost and delay implementation of the new Services. There is no demonstrated

¹⁴ Sony Comments at 3.

need for such standardization, which not only is beyond the scope of a waiver proceeding, but also is outside the Commission's jurisdiction.

Sony Electronics also asks the Commission to "require the deployment of SOC in a manner that creates a 'consistent and predictable experience' for consumers."¹⁵ While this is a subjective metric that is difficult, if not impossible, to achieve through any specific requirement, the Petitioners fully expect and intend that the services developed with their MVPD partners will provide such an experience for consumers. As described above, the Petitioners and their MVPD partners have every incentive to make the new Services readily accessible and a positive viewing experience. However, because the Services will be entirely new viewing experiences, there are no established consumer expectations¹⁶ to maintain.¹⁷ Indeed, the increased flexibility that Petitioners and their MVPD partners will have in the development process as a result of this Waiver will encourage innovation to create new and beneficial consumer experiences. In contrast, a waiver grant with onerous conditions will severely limit this potential. MPAA urges the Commission to reject calls for conditions or other requirements that will unnecessarily restrict the Petitioners' ability to provide consumers with these new Services.

V. IMPOSING ARBITRARY AND UNNECESSARY TIME-BASED RESTRICTIONS WOULD FRUSTRATE THE PUBLIC INTEREST BENEFITS OF THE WAIVER

Any calendar-based restriction on the timeframe for the Waiver would be impractical and fail to provide the regulatory certainty needed by movie producers to enter into negotiations with MVPDs for the distribution of early-release, high-definition films.

¹⁵ *Id.*

¹⁶ See Comments of Public Knowledge, Consumer Federation of America, Digital Freedom Campaign, Electronic Frontier Foundation, Media Access Project, New America Foundation, U.S. PIRG. ("Public Knowledge Comments") at 5-12.

¹⁷ See generally Comments of the Home Recording Rights Coalition.

A. A Temporary Waiver is Tantamount to a Denial

Some commenters suggest that any SOC waiver be temporary.¹⁸ As a practical matter, however, grant of the requested Waiver with a pre-determined sunset date would be tantamount to a denial because Petitioners and MVPDs are not likely to invest the substantial amounts of capital and marketing resources necessary to launch a new, early-release movie service knowing that this investment could evaporate on a certain date. The possibility that the Commission might extend the waiver would be, as a business matter, insufficient to weigh against the huge investment at risk. Further, such a restriction would be strongly anti-consumer as it would cause significant confusion and disenfranchisement should the waiver sunset or be revoked and the Services discontinued once consumer expectations had been set. Thus, calls for a temporary waiver are, in fact, calls for rejection of the proposed new Services.

B. A Limited Time Window for the New Services Would be Arbitrary and is Unnecessary

Some commenters suggest that the Commission designate a specific period, *e.g.*, 120 days after theatrical release, during which movies can be made available as part of the proposed new Services.¹⁹ Based on present practices, a 120-day window might allow most new movies to be included in the proposed new services. However, all movies do not experience the same release pattern. Some exceptionally popular movies remain in theatrical release much longer than less popular movies and could be artificially excluded from the new Services by a fixed window. Other movies have a limited theatrical opening followed by a broader release and likewise could also be excluded from the new Services by a fixed window.

Further, there is no compelling need to establish an arbitrary, fixed window for the

¹⁸ See, *e.g.*, TiVo Comments at 3-4 (proposing limited two-year waiver).

¹⁹ DTLA Comments at 9-11.

proposed new Services. In fact, there are compelling marketplace statistics that demonstrate such a regulatory limitation is unnecessary. Some 50 percent of total movie revenues are earned in the home video, primarily DVD, market.²⁰ Thus, there are very strong marketplace incentives to release a movie in the DVD window, and it would be counter to the Petitioners' interests to indefinitely delay DVD release to keep the movie in the proposed window for the new Services. This is a clear instance when marketplace forces will act to assure the quickest sequential release pattern. An arbitrary, fixed regulatory window is not necessary and likely would reduce consumer choice by excluding certain movies from the Services.

VI. PETITIONERS HAVE FULLY DEMONSTRATED THE VALIDITY OF THEIR CONCERNS REGARDING THE SECURE DELIVERY OF HIGH-VALUE CONTENT

Some commenters argue that the requested Waiver is unnecessary²¹ and that there is no evidence of harm due to the "analog hole."²² Although major movies are not and never have been made available for MVPD home viewing prior to the VHS or DVD release, these parties seem to see no compelling public interest in giving consumers an opportunity to view such movies sooner and in a higher quality format. Maintaining the status quo, however, will limit consumer choice with respect to MVPD services.

The analog hole is one of the clearest illustrations of why this is so. Despite best efforts on the part of distributors to protect against piracy, MVPD content is exposed to indiscriminate reproduction and redistribution through different means, including when it flows through analog

²⁰ See <http://www.hoovers.com/motion-picture-production-and-distribution>, *Hoover's Industry Overview: Motion Picture Production and Distribution* ("Secondary releases, mainly on DVD through wholesale and retail channels, contribute 50 percent of industry revenue").

²¹ Public Knowledge Comments at 13-17.

²² Comments of the Consumer Electronics Association ("CEA Comments") at 6-7.

outputs that either lack, or can easily be stripped of, protection measures.²³ It is in part for this reason that virtually all movies are now offered for MVPD distribution only after or simultaneous with release in DVD format.²⁴ By restricting MVPD release in this way, movie distributors make the most efficient use of available technical protection measures and minimize to the extent possible the impact of the analog hole. The fact that almost no movies are made available to MVPDs pre-DVD release is clear and convincing evidence that the analog hole is an impediment to the early window release of high-value content. Absent the additional protection afforded by SOC, this barrier will impede the delivery of high-value content, thereby limiting consumers' viewing options in terms of MVPD services.

VII. PETITIONERS HAVE SATISFIED THE REQUIREMENTS NECESSARY TO OBTAIN A WAIVER

A. The Petition Meets the Commission's Procedural Requirements for Seeking Waiver of the SOC Prohibition

Some commenters have suggested that the Services are not a "new business model"²⁵ or, that Petitioners must meet the Commission's requirements for modifying or establishing encoding rules for a new service or business model.²⁶ In adopting the SOC prohibition, the Commission "recognize[d] that [SOC] functionality might have future applications that could potentially be advantageous to consumers, such as facilitating new business models," and, accordingly, stated that it would "consider waivers, petitions, or other proposals to use [SOC] in

²³ *Plug-and-Play Leaves Analog Hole Open*, CEDMAGAZINE.COM (Sept. 11, 2003) ("Passing a digital signal through an analog output strips away the copy-protection codes. If a recording is made in analog, it can be re-digitized without copy protection and transmitted over the Internet or to or to any other digital device.").

²⁴ The fact that a small number of independent films have been (or may soon be) offered to MVPDs prior to their release on DVD (*see* Public Knowledge Comments at 14) does not change the fact that the vast majority of movies—including those produced by the Petitioners—have never been so offered to MVPDs. Therefore, the proposed Services are a "new business model" as contemplated by the Commission.

²⁵ Public Knowledge Comments at 13-15.

²⁶ CEA Comments at 8.

this regard.”²⁷

Given that the proposed Services involve high-value content in high-definition format that has never before been offered to MVPD subscribers in such an early window, they without question represent a new business model along the lines the Commission envisioned with respect to SOC waivers. Further, the Commission’s use of the term “new business model” in conjunction with SOC waivers is wholly distinct from its use of the terms “new services” and “defined” and “undefined business models” with respect to the modification or establishment of encoding rules under Sections 76.1905 and 76.1906.²⁸ If the Commission had intended for a party seeking to use SOC to follow the procedures under either of those sections, the Commission would have said so. To the contrary, both Section 76.1905 and 76.1906 explicitly reference modification or establishment of encoding rules under section 76.1904—which deal with down resolution and copy protection caps—rather than its rule on SOC contained in Section 76.1903. It is for this reason that the Commission invited the filing of “waivers, petitions, or other proposals,” with respect to the rule on SOC, which MPAA has done.

B. The Petition is Sufficiently Specific to Justify Grant of a Waiver

The Independent Film & Television Alliance (“IFTA”) and several other commenters argue that MPAA’s Waiver Request is “vague and undefined.”²⁹ IFTA would have all affected parties “work cooperatively to define exactly what sort of service is desirable” before seeking Commission action.³⁰ Yet the scope of MPAA’s request is quite specific and well-defined: in order to qualify for the Waiver, a movie must be initially released in theaters and not yet released

²⁷ *Plug and Play Order*, ¶61.

²⁸ *See* 47 C.F.R. §§ 76.1905, 76.1906.

²⁹ Comments of the Independent Film & Television Alliance (“IFTA Comments”) at 6.

³⁰ *Id.* at 3.

in DVD format that does not utilize SOC.³¹ Apart from determining whether such services merit use of SOC, other topics are beyond the scope of the instant Waiver Request. By removing this regulatory impediment, the Commission will create an environment in which movie distributors, MVPDs, and consumers can interact in the marketplace to develop new, innovative program Services that benefit consumers.

VIII. CONCLUSION

By granting the Waiver Request, the Commission will open the door to new, exciting Services for consumers—a broad range of high-definition, first-run movies delivered to their home televisions via their MVPD, in an earlier timeframe than ever previously offered. Permitting the use of SOC will greatly benefit consumers who choose to take advantage of these new Services and will in no way prevent other consumers from continuing to enjoy the services they presently enjoy. Making this win-win scenario a reality is without question in the public interest because it will foster innovation, increase consumer choice, provide necessary technological flexibility, and promote competition. Further, none of the arguments made by opponents are availing. For these and other reasons discussed herein, the Commission should grant the instant Waiver Request expeditiously.

³¹ Although IFTA expresses concern that the Waiver might apply only to “studio-supplied content,” MPAA (which filed the Petition on behalf of its member companies because those are the only movie producers for whom MPAA can speak) would have no objection to a waiver that would allow MVPDs to exercise SOC with respect to any movie initially released in theaters prior to DVD release.

Respectfully submitted,

MOTION PICTURE ASSOCIATION OF
AMERICA, INC.

/s/ Michael P. O'Leary

By:

Michael P. O'Leary

Senior Vice President & Chief Counsel

Federal Affairs & Policy

Motion Picture Association of America, Inc.

1600 Eye Street, NW

Washington, DC 20006

202-293-1966

July 31, 2008

CERTIFICATE OF SERVICE

I, Lisa Barton, hereby certify that on this 31st day of July 2008, a copy of the foregoing Reply Comments of Motion Picture Association of America has been served by first-class mail, postage prepaid, on each of the following persons:

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Elizabeth Andrion
Office of Chairman Kevin J. Martin
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Rick Chessen
Office of Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Rudy Brioché
Office of Commissioner
Jonathan S. Adelstein
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Cristina Chou Pauzé
Office of Commissioner Robert M. McDowell
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Amy Blankenship
Office of Deborah Taylor Tate
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Monica Desai
Chief, Media Bureau
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Thomas Horan
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Nancy Murphy
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Mary Beth Murphy
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Steven Broeckaert
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Brendan Murray
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Michael Lance
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Jenifer Simpson
Senior Director, Telecommunications & Technology Policy
American Association of People with Disabilities
1629 K Street NW, Suite 503
Washington, DC 20006

Grover Norquist
President, Americans for Tax Reform
1920 L Street, NW
Suite 200
Washington, DC 20036

Derek Hunter
Executive Director, Media Freedom Project
1920 L Street, NW
Suite 200
Washington, DC 20036

Christopher M. Heimann
Gary L. Philips
Paul K. Mancini
AT&T Inc.
1120 20th Street, NW, Suite 1000
Washington, DC 20036

Gary J. Shapiro
President and CEO
Consumer Electronics Association
1919 S. Eads St.
Arlington, VA 22202

Seth D. Greenstein
Constantine Cannon LLP
Counsel for Digital Transmission Licensing Administrator LLC
1627 Eye Street, NW, 10th Floor
Washington, DC 20006

Kathy Garnezy
Assistant Executive Director
Government & International Affairs
Directors Guild of America
7920 Sunset Blvd.
Los Angeles, CA 90046

William M. Wiltshire
Michael D. Nilsson
Harris Wiltshire & Grannis, LLP
Counsel for DirectTV, Inc.
1200 Eighteenth Street, NW
Washington, DC 20036

Robert S. Schwartz
Constantine Cannon LLP
Counsel for Home Recording Rights Coalition
1627 Eye Street, NW, 10th Floor
Washington, DC 20006

Jean M. Prewitt
President & Chief Executive Officer
Independent Film & Television Alliance
10850 Wilshire Blvd., 9th Floor
Los Angeles, CA 90024

G. Kendrick Macdowell
Vice President, General Counsel
& Government Affairs Director
National Association of Theatre Owners
750 First Street, NE, Suite 1130
Washington, DC 20002

Pete Sepp
National Taxpayers Union
108 North Alfred Street
Alexandria, VA 22314

Daniel L. Brenner
Neal M. Goldberg
National Cable & Telecommunications Association
25 Massachusetts Ave, NW, Suite 100
Washington, DC 20001-1431

Jeffrey Pearlman
Public Knowledge
1875 Connecticut Ave., NW
Suite 650
Washington, DC 20009

Joel K. Wiginton
Vice President and Senior Counsel
Sony Electronics, Inc.
1667 K Street, NW
Suite 200
Washington, DC 20006

James M. Burger
Derek Teslik
Dow Lohnes PLLC
Counsel for TiVO, Inc.
1200 New Hampshire Ave., NW
Suite 800
Washington, DC 20036

/s/ Lisa Barton

Lisa Barton